In the Supreme Court of the United States

No. 485.

OCTOBER TERM, 1963.

LOCAL 20, TEAMSTERS, CHAUFFEURS AND HELPERS UNION, an Affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,

Petitioner,

vs.

LESTER MORTON, d/b/a LESTER MORTON TRUCKING COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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CITATIONS TO OPINIONS BELOW.

The opinion of the District Court, printed in Appendix A to the Petition for Certiorari, is reported in 200 F. Supp. 653. The opinion of the Court of Appeals, printed in Appendix B to the Petition for Certiorari, is reported at 53 L. R. R. M. 2839.

JURISDICTION.

The judgment of the Court of Appeals, printed in Appendix C to the Petition for Certiorari (page 37), was entered on July 25, 1963. The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254(1).

QUESTIONS PRESENTED.

1. Whether a federal court having jurisdiction of a labor union that has violated Section 303, Labor Management Relations Act of 1947, has jurisdiction also to award compensatory and punitive damages against such union where it has engaged in activities constituting intimidation and threats to the public order and constituting, under state common law, a secondary boycott and the tort of malicious and wanton interference with business, where such state common law allows such compensatory and punitive damages.

2. Whether Respondent's total damages were properly awarded him when such damages were occasioned as a result (1) solely of the Teamsters Union's unlawful strike activity, or, construing the facts most favorably for the Teamsters Union (2) jointly of an inseparable combination of the Teamsters Union's unlawful strike activity and the Teamsters Union's primary picket line.

STATUTE INVOLVED.

The statute involved in Section 303 of the Labor Management Relations Act of 1947, 61 Stat. 158, 29 U. S. C., Section 187. It is printed in Appendix D to the Petition for Certiorari (page 38-39).

STATEMENT.

The Facts.

The Respondent, Lester Morton, d/b/a Morton Trucking Company (referred to as "Respondent") is engaged in the general dump truck business in Tiffin, Ohio, operating approximately 50 dump trucks as a subcontractor on highway construction (Finding of Fact 1).[1] For some years the Respondent's employees had been members of the petitioning Teamsters Local 20 (referred to as "Teamsters Union") under an oral agreement, but on August 17, 1956 the Teamsters Union struck in support of its demands for a written contract and wage increases (F. F. 2). On August 21, 1956 the Common Pleas Court of Seneca County, Ohio restrained the Teamsters Union from, inter alia, engaging in secondary boycott activity, from intimidating Respondent's employees and from following Respondent's employees on the public highways or elsewhere (F. F. 3).

The Teamsters Union's Malicious Intimidation.

The Teamsters Union did not engage in any actual physical violence during the strike, which ended October 5, 1956 (F. F. 2 and 4) but the Teamsters Union caused some of Respondent's employees who did go to work and drive his trucks to be followed along rural roads and highways by automobiles containing the Teamsters Union's agents and striking members (76-79a, 107a, 108a). This intimidating and threatening activity of the Teamsters Union made the strike effective to prevent many of Respondent's employees from returning to work (314a, 315a; F. F. 10).

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[1] The District Court's Findings of Fact and Conclusions of Law are Appendix A to this brief.

The Teamsters Union also maliciously engaged in secondary activity unlawful under Section 303, L. M. R. A., and the common law of Ohio (F. F. 13; Conclusion of Law 5). This unlawful activity made the strike effective to intimidate Respondent's employees, customers and suppliers, severely damaging Respondent's business as hereinafter set forth.

A. SECTION 303 VIOLATIONS.

1. France Stone Company.

One of Respondent's suppliers was The France Stone Company. In violation of the restraining order and in violation of Section 303 of the Labor Management Relations Act and the state's common law, the Teamsters Union maliciously and in wanton disregard of the rights of the Respondent, encouraged France's employees to engage in a concerted refusal to load Respondent's trucks for the purpose of forcing France to cease doing business with the Respondent (66a, 67a, 70a, 71a, 96a, 97a, 123a; F. F. 6 and 13; C. L. 5).

2. O'Connel Coal Co.

One of Respondent's customers was the O'Connel Coal Co. In violation of Section 303, L. M. R. A., and the state's common law, the Teamsters Union maliciously and in wanton disregard of the rights of the Respondent, encouraged O'Connel's employees to force O'Connel, and encouraged the management of O'Connel direct, to cease doing business with the Respondent (151a, 152a, 153a, 157a, 158a, 162a; F. F. 7 and 13; C. L. 5). Consequently, O'Connel ceased doing business with the Respondent during the strike (162a; F. F. 7 (d)) and Respondent suffered $1,600.00 in damages (471a, 475a; F. F. 12).

3. C. A. Schoen, Inc.

Another of Respondent's customers was C. A. Schoen, Inc. In violation of the restraining order and in violation of Section 303, L. M. R. A., and the state's common law, the Teamsters Union maliciously and in wanton disregard of the rights of the Respondent, encouraged Schoen's employees to force Schoen, and encouraged the management of Schoen direct, to cease doing business with the Respondent (170a, 77-81a, 106-111a, 175-184a; F. F. 9 and 13; C. L. 5). Consequently, Schoen ceased doing business with the Respondent during the strike (174-177a, 175-184a; F. F. 9 (d)).

B. COMMON LAW VIOLATIONS.

1. Launder & Son, Inc.

Another of Respondent's customers was Launder & Son, Inc. In violation of the restraining order and in violation of the state's common law, the Teamsters Union maliciously and in wanton disregard of the rights of the Respondent, encouraged and requested Launder to cease doing business with the Respondent (196a, 111-115a, 73-76a; F. F. 8 and 13; C. L. 5). Consequently, Launder ceased doing business with the Respondent during the strike (201a; F. F. 8 (c)) and Respondent suffered $8,700.00 in damages (474a, 475a; F. F. 12).

2. Wilson Sand & Gravel Co.

Another of Respondent's customers was the Wilson Sand & Gravel Co. As a result of a combination of the Teamsters Union's primary picket line and its unlawful secondary activity, Respondent had an insufficient number of truck drivers during the strike to perform fully his contract with Wilson and consequently, Respondent suffered damages in the amount of $9,300.00 (227a, 253a, 473a, 475a; F. F. 11 and 12).

The Proceedings Below.

The district court concluded that the Teamsters Union had engaged in secondary boycott activity unlawful under Section 303, L. M. R. A., and that such court had jurisdiction to adjudicate the Respondent's entire cause of action. That court also concluded that the material and operative facts supporting Respondent's federal claim of secondary activity unlawful under Section 303, L. M. R. A., were substantially the same as the facts supporting his non-federal or state common law claim of unlawful secondary activity and that there are not involved two causes of action, but simply different grounds to support the same cause of action, the cause of action being the Teamsters Union's violation of Respondent's right to be free from unlawful interference with his business (C. L. 1, 2 and 3). The district court also concluded that under *Hurn vs. Oursler*, 289 U. S. 238, and *United Mine Workers vs. Meadow Creek Coal Co.*, 263 F. (2) 52 (C. A. 6), certiorari denied 359 U. S. 1013, it had jurisdiction to award compensatory and punitive damage under the common law in addition to having jurisdiction to award compensatory damages under Section 303, L. M. R. A. (C. L. 4). The district court also found that the Teamsters Union had engaged in both lawful and unlawful strike activity and concluded that therefore the totality of the Teamsters Union's efforts should be considered in assessing damages based upon all loss suffered as a result of the strike (C. L. 6).

The district court found that the Respondent suffered net specific damages in the amount of $19,619.62 (471a, 473a, 474a, 475a; F. F. 12) and awarded compensatory damages in that amount together with punitive damages in the amount of $15,000.00 as a consequence of the fact that

the Teamsters Union's conduct was pursued maliciously and in wanton disregard of the legal rights of the Respondent (F. F. 13 and 14).

The Court of Appeals for the Sixth Circuit affirmed the judgment of the district court and the Teamsters Union has petitioned for certiorari.

SUMMARY OF ARGUMENT.

QUESTION I.

1. The federal district court in this action had jurisdiction over the Teamsters Union as a consequence of its violation of Section 303, L. M. R. A., and therefore such court had ancillary jurisdiction to apply the state common law to award compensatory and punitive damages for violations thereof.

2. The doctrine of ancillary jurisdiction is one of general application and is not dependent upon the presence of intimidation and threats to the public order.

3. There were, however, intimidation and threats to the public order in this case and such Teamsters Union's conduct was further justification for awarding compensatory and punitive damages under state law.

QUESTION II.

The federal district court correctly awarded Respondent his total damages because such damages were occasioned as a result (1) solely of the Teamsters Union's unlawful strike activity, or, construing the facts most favorably for the Teamsters Union, (2) jointly of an inseparable combination of the Teamsters Union's unlawful strike activity and the Teamsters Union's primary picket line.

ARGUMENT.

QUESTION I.

A federal court having jurisdiction of a labor union that has violated Section 303, Labor Management Relations Act of 1947, has jurisdiction also to award compensatory and punitive damages against such union where it has engaged in activities constituting intimidation and threats to the public order and constituting, under state common law, a secondary boycott and the tort of malicious and wanton interference with business, where such state common law allows such compensatory and punitive damages.

1. The Federal Courts' Ancillary Jurisdiction.

The district court concluded that the Teamsters Union's conduct in appealing to the employees of Respondent's suppliers and customers for the purpose of encouraging such employees to force such suppliers to cease doing business with the Respondent violated Section 303 of the Labor Management Relations Act and that compensatory damages should be granted thereunder for such conduct (627-8a). The district court also concluded that the petitioning Teamsters Union's conduct in appealing *direct* to Respondent's suppliers and customers for the purpose of encouraging or forcing them to cease doing business with the Respondent violated the common law of Ohio; that such conduct by the petitioning Teamsters Union was conducted maliciously and in wanton disregard of the rights of the Respondent; and that compensatory and punitive damages should be granted under the common law of Ohio (F. F. 13; C. L. 5) (626-7a).

The Ohio common law is important in this case because at the time of the strike here involved Section 303 of

the Labor Management Relations Act did not proscribe a union's applying pressure directly on a customer or supplier when employees were not contacted.[2]

The common law of Ohio clearly establishes that appeals by a striking union to the struck employer's customers and suppliers, urging cessation of business by those customers and suppliers with the struck employer are unlawful and this is so whether or not the striking union appeals to such customers' or suppliers' employees, and damages may be awarded the struck employer for the losses suffered. 33 *Ohio Jurisprudence* (2) Section 64, Secondary Boycott, pages 187-8; *Moores & Co. vs. Bricklayers' Union, et al.*, 10 Ohio Decision Reprint 665 (affirmed by the Supreme Court of Ohio, 51 O. S. 605); *Schmidt Packing Co. vs. Local Union No. 346, Amalgamated Meat Cutters & Butcher Workmen of North America, et al.*, 48 ALC 547 (1947); and *W. E. Anderson Sons Co. vs. Local 311 Teamsters, etc.*, 156 O. S. 541. The common law of Ohio also is to the effect that punitive damages may be awarded in tort actions which involve malice or the wanton disregard of the legal rights of others; 16 *Ohio Jurisprudence* (2) Damages, Section 145, Tort Actions Generally, page 281; *Smithhisler vs. Dutter*, 157 O. S. 454, 105 N. E. (2) 868 (1952).

The Sixth Circuit Court of Appeals held that the Findings of Facts of the district court as to secondary boycott activities violative of Section 303 of the Labor Management Relations Act and of the state common law were "amply supported by the evidence and are not clearly erroneous", citing *Commissioner of Internal Revenue vs. Duberstein*, 363 U. S. 278, 291. The district court con-

[2] Section 303 has since been amended and now proscribes such activity. Since the federal statute and state common law are now in accord, this case is of very limited significance.

cluded that the Respondent's claim of unlawful secondary activity violative of Section 303 of the Labor Management Relations Act and unlawful activity violative of the common law of Ohio are not separate causes of action, but merely different grounds to support a single cause of action, the cause of action being the violation by the Teamsters Union of the Respondent's right to be free from unlawful interference with his business. The Sixth Circuit Court of Appeals agreed, citing, inter alia, *Hurn vs. Oursler*, 289 U. S. 238; *United Mine Workers vs. Meadow Creek Coal Co.*, 263 F. (2) 52 (C. A. 6, 1959), cert. den. 359 U. S. 1013; and *United Mine Workers vs. Osborne*, 279 F. (2) 716 (C. A. 6, 1960), cert. den. 364 U. S. 881.

The petition for certiorari herein fails to discuss the applicability of *Hurn vs. Oursler, supra*, although it is the *Hurn* case which the Court of Appeals below relied upon in affirming the jurisdiction of the district court to retain jurisdiction of this case to award compensatory and punitive damages under the state common law. It is also the *Hurn* case that the Sixth Circuit Court of Appeals relied upon in affirming the jurisdiction of the federal district courts to award compensatory and punitive damages under state common law in the *Meadow Creek* and *Osborne* cases, *supra*. In the *Hurn* case this Court held that when a case presents a substantial federal question, the trial court has jurisdiction to dispose of all grounds, either federal or state, which are "in support of a single cause of action". There, a suit was filed in the United States District Court seeking redress for copyright infringement which raised a substantial federal question and sought to obtain relief, as well, upon the ground that identical acts constituting the alleged infringement were also unfair competition under the state law. It was held by this Court that the federal question raised by the pleadings gave the court

jurisdiction; and that, although the federal claim was rejected on the merits, the district court still possessed jurisdiction to decide the claim of unfair competition on the merits.[3]

The petition for certiorari herein likewise does not discuss the applicability of the *Meadow Creek* and *Osborne* cases, *supra*, although in its Court of Appeals brief the Teamsters Union unsuccessfully attempted to distinguish them on the grounds that they involved actual and extensive violence. There is nothing in the Court of Appeals' opinions to suggest that jurisdiction was dependent upon the presence of violence, actual or threatened. In the *Meadow Creek* case, which was on this point followed in the *Osborne* case, the Court of Appeals (263 F. (2) 52, 60, 64) relied upon the *Hurn* case as authority for the jurisdiction of the trial court to award compensatory and punitive damages under the state common law. In the *Meadow Creek* case the Court of Appeals (263 F. (2) at 64) awarded punitive damages because of the *maliciousness* of the civil conspiracy, *not* because of the violence involved. And it surely is not necessary to observe that the *Hurn* case did not involve actual or threatened violence.

As pointed out at page 29 et seq. of the Respondent's brief in opposition to the petition for certiorari in the *Gilchrist* case, the doctrine of ancillary or pendent jurisdiction is a rule of general application which has been applied:

(1) In cases involving a claim in the field of federal patent or trademark law with an accompanying state unfair competition claim in such cases as *Hurn vs. Oursler*,

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[3] The case now before the Court is stronger for the Respondent than the *Hurn* case because here the federal claim was not rejected on the merits. The Teamsters Union has been found to have violated Section 303, L. M. R. A.

supra; Armstrong Paint and Varnish Works vs. Nu-Enamel Corp., 305 U. S. 315 (1939); *In re Amtorg Trading Corp.*, 75 F. (2) 826 (Ct. of Patent App., 1935); *Edelmann & Co. vs. AAA Specialty Company*, 88 F. (2) 852 (C. A. 7, 1937); *Sinko vs. Snow-Craggs Corporation*, 105 F. (2) 450 (C. A. 7, 1939); *Maternally Yours vs. Your Maternity Shop*, 234 F. (2) 538 (C. A. 2, 1956).

(2) Under the Jones Act wherein claims are combined for unseaworthiness and maintenance and cure with an admiralty claim in such cases as *Jordine vs. Walling*, 185 F. (2) 662 (C. A. 3, 1950); *Troupe vs. Transit Company*, 234 F. (2) 253 (C. A. 2, 1956); *Doucette vs. Vincent*, 194 F. (2) 834 (C. A. 1, 1952).

(3) In cases wherein claims under the Federal Transportation Acts are combined with claims under the state or common law in such cases as *Southern Pacific Company vs. Van Hoosear*, 72 F. (2) 903 (C. A. 9, 1934); *Strachman vs. Palmer*, 177 F. (2) 427 (C. A. 1, 1949); *Chicago Great Western Railway Co. vs. Chicago, Burlington and Quincy Railway Co.*, 193 F. (2) 975 (C. A. 8, 1952).

(4) In cases wherein a claim under the Federal Securities and Exchange Act is combined with a state or common law claim for fraud in such cases as *Errion vs. Connell*, 236 F. (2) 447 (C. A. 9, 1956); *Jung vs. K & D Mining Co.*, 260 F. (2) 607 (C. A. 7, 1958).

(5) In cases wherein claims under the Sherman and Clayton Acts are combined with claims under the state law or common law dealing with monopoly or trusts in such cases as *South Side Theatres vs. United West Coast Theatres Corporation*, 178 F. (2) 648 (C. A. 9, 1949); *Braddick v. Federation of Shorthand Reporters*, 115 F. Supp. 550 (S. D. N. Y., 1953).

(6) In cases wherein claims under the Fair Labor Standards Act are combined with claims for compensation outside of said acts in such cases as *Manosky v. Bethlehem Hingham Shipyard*, 177 F. (2) 526 (C. A. 1, 1949); *Hogue vs. National Automotive Parts Association*, 87 F. Supp. 816 (E. D. Mich., 1949); *Wertanen et al. vs. Welduction Corporation*, 151 F. Supp. 440 (E. D. Mich., 1957).

(7) In cases wherein claims under statutes relating to national banks are combined with claims under the state or common law in such cases as *Gulley vs. First National Bank of Meridian*, 81 F. (2) 502 (C. A. 5, 1936).

(8) In cases wherein a claim complying with the diversity of citizenship and jurisdictional amount requirements is combined with a claim which does not comply with such requirements in such cases as *American Fidelity & Casualty Company vs. Owensboro Milling Company*, 222 F. (2) 109 (C. A. 6, 1955).

(9) In cases wherein a claim against a labor union under Section 303, L. M. R. A., is combined with a claim for compensatary and punitive damages under state common law in such cases as *United Mine Workers vs. Meadow Creek Coal Co.*, 263 F. (2) 52 (C. A. 6, 1959) cert. den. 359 U. S. 1013; *William G. Gilchrist, Jr., et al. vs. United Mine Workers*, 290 F. (2) 36 (C. A. 6, 1961) cert. den. 368 U. S. 875; *United Mine Workers vs. Osborne Mining Co., Inc.* 279 F. (2) 716 (C. A. 6, 1960) cert. den. 364 U. S. 881; and *Flame Coal Company vs. United Mine Workers*, 303 F. (2) 39 (C. A. 6, 1962), cert. den. 371 U. S. 891.

It is submitted that the foregoing cases establish that the applicability of the doctrine of pendent or ancillary jurisdiction is not dependent upon the presence of violence, actual or threatened. Accordingly, the district court

had ancillary jurisdiction to hear and determine Respondent's common law cause of action, without regard to the existence of violence, actual or threatened.

2. The Garmon, Laburnum, Russell and Youngdahl Cases.

Because the Teamsters Union must distinguish the recent *Meadow Creek*, *Osborne*, *Gilchrist* and *Flame* cases, *supra*, if it is to have any hope of having certiorari granted in this case, the Teamsters Union observes that there was no actual violence in this case. In the last mentioned cases there was, of course, extensive actual violence, although as stated above, the Court of Appeals did not suggest that its jurisdiction depended in any way upon the presence of such actual violence.

An examination of the petitions for certiorari and the briefs in opposition thereto in the *Meadow Creek*, *Osborne* and *Gilchrist* cases establishes that the trial courts' jurisdiction to grant compensatory and punitive damages for common law violations was extensively argued before this Court. None of such briefs even suggested that the actual violence there involved in any way supported the trial courts' jurisdiction.

The Teamsters Union's argument as to the absence of actual violence in this case requires consideration of *San Diego Building Trades Council vs. Garmon*, 359 U. S. 236 (1959); *International Union, United Automobile, Aircraft and Agricultural Implement Workers, etc. vs. Russell*, 356 U. S. 635 (1958); *United Construction Workers, etc. vs. Laburnum Construction Corp.*, 347 U. S. 656 (1954); and *Youngdahl, etc. vs. Rainfair, Inc.*, 355 U. S. 131 (1957).[4]

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[4] It must be remembered however that Section 303, L. M. R. A. was not involved in *Garmon*, *Russell*, *Laburnum* and *Youngdahl*.

The *Garmon* case of course held that the California *state* court could *not* grant a monetary judgment against a union for violation of the state's *statutory* law, where the union's conduct was peaceful and involved no imminent threats to the public peace and order. In *Garmon* (359 U. S. at 247) the Court said:

> "It is true that we have allowed the States to grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order. International Union, United Automobile, Aircraft and Agricultural Implement Workers, etc. v. Russell, 356 U. S. 634, 78 S. Ct. 932, 2 L. Ed. 2d 1030; United Construction Workers, etc. v. Laburnum Const. Corp., 347 U. S. 656, 74 S. Ct. 833, 98 L. Ed. 1025. We have also allowed the States to enjoin such conduct. Youngdahl vs. Rainfair, Inc., 355 U. S. 131, 78 S. Ct. 206, 2 L. Ed. 2d 151; United Automobile, Aircraft and Agricultural Implement Workers, etc. vs. Wisconsin Employment Relations Board, 351 U. S. 266, 76 S. Ct. 794, 100 L. Ed. 1162. State jurisdiction has prevailed in these situations because the compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction."

If, as the Teamsters Union contends, *Garmon* (together with the *Laburnum*, *Russell* and *Youngdahl* cases discussed therein) is authority to be applied here, that authority must be applied properly and not as the Teamsters Union suggests. The *Garmon*, *Laburnum*, *Russell* and *Youngdahl* cases hold that *state* courts applying state law cannot enjoin or award damages against unions for conduct arguably constituting an unfair labor practice under the Labor Management Relations Act *unless* there is *either* violence *or* an imminent threat to the public order. The *Garmon* case involved neither violence nor an im-

minent threat to the public order. The *Laburnum*, *Russell* and *Youngdahl* cases, like the instant case, involved no actual physical violence but did involve imminent threats to the public order. The nature of the conduct involved in *Laburnum* and *Russell* is reviewed in footnote 4 of each decision where it appears that although there were threats there was no actual physical violence.

In *Laburnum*, which affirmed a state court award of compensatory and punitive damages against a union which by threats but not by physical violence, demanded that plaintiff's employees join the union, with the result that the employer had to abandon its work, this Court held, 347 U. S. at 664, that Congress has neither provided or suggested any substitute for the traditional state court procedure for collecting damages caused by tortious conduct involving threats to the public order even though such conduct constituted an unfair labor practice under the Labor Management Relations Act. In *Russell*, which affirmed a state court award of compensatory and punitive damages against a union arising out of conduct violative of the Labor Management Relations Act where by intimidation but not by actual physical violence, the union denied a worker access to a plant during a strike, this Court held, 356 U. S. 641-2, that the fact that the Labor Management Relations Act provided a means of "partial" relief by way of a monetary award of back pay, did not preclude a victim of a common law tort involving intimidation and threats to the public order from a common law action for *all* damages suffered. Likewise, in this case, the fact that the Labor Management Relations Act provided a measure of partial relief by way of a suit for damages for certain types of secondary activity will not preclude a victim of the common law tort of secondary boycott activity involving intimidation and threats to the public order, from a common law action for *all* damages suffered.

In *Youngdahl* this Court approved the issuance of a state court injunction to the extent that it *enjoined* a striking union that had *not* engaged in actual violence against conduct consisting of verbal insults and name calling that was *calculated* to *provoke* violence. In that case the union relied heavily on the argument that there had been no actual violence but this Court held (355 U. S. at 138) that the issue was whether "the conduct and language of the strikers were likely to *cause* physical violence" (emphasis added); that words can readily be so coupled with conduct to provoke violence; and that the trial court "was in a better position (than this Court) to assess the local situation (and to conclude that) the conduct and massed name calling by petitioners were calculated to provoke violence and were likely to do so unless promptly restrained."

3. The Teamsters Union's Intimidation and Threats to the Public Order.

Although the instant case did not involve actual physical violence, it certainly involved "imminent threats to the public order." The Teamsters Union did not content itself with peacefully picketing the Respondent's garage and terminal. When it became apparent that such conduct was not effective to prevent Respondent's employees from going to work, the Teamsters Union caused some of the employees that did go to work to be followed in automobiles filled with strikers or agents of the Teamsters Union, or both (76-79a, 107a, 108a, 128a, 129a, 314a, 315a; F. F. 10). The trailing of lone truck drivers, down country roads by car loads of Teamsters Union agents and strikers was well calculated to intimidate and threaten such truck drivers. This course of action by the Teamsters Union was effective to cause an employee who did not want to risk getting hurt from crossing the picket line (F. F. 10). The

Respondent's employees were further intimidated by repeatedly encountering the Teamsters Union's unlawful pickets at the premises of Respondent's suppliers and customers (67-8a, 71a, 88a, 128-9a, 132-3a, 257a; 79a, 80-1-2a). The Respondent's employees never knew when they might next be encountered by Teamsters Union's agents because they knew the strike activity was not being confined to the Respondent's premises. Thus, it was not necessary for the Teamsters Union to engage in *actual* violence.

Surely this Court will agree that the massed name calling that occurred at the *primary* picket line in the *Youngdahl* case was not as likely to provoke violence and threaten the public order as the unlawful *secondary* activity involved in this case. *A non-striking employee accompanied by other non-striking employees, crossing a picket line while being subjected to name calling and indecent gestures (as happened in Youngdahl) is not nearly as vulnerable to actual violence as is a non-striking employee who alone leaves the primary site in a truck to be followed by strikers and to be alone encountered by other strikers at rural gravel pits.*

Such intimidation and threats to the public order caused the local state court to be concerned about the public peace and order and it issued an ex parte restraining order (461a), restraining the Teamsters Union from engaging in secondary boycott activity and from following the Respondent's employees "on the public highways or elsewhere," which order was not dismissed by the state court until the seven weeks' long strike ended (482a). As held by this Court in *Youngdahl* (355 U. S. at 139), the state trial court was in a better position than any other court to assess the local situation as to whether the union's conduct was likely to provoke violence.

Accordingly, if, as the Teamsters Union argues, the pre-emption decisions of this Court are to be analyzed and categorized as to the presence or absence of intimidation and threats to the public order, this case must be placed alongside *Laburnum*, *Russell* and *Youngdahl* which involved intimidation and threats to the public order and not with *Garmon*, *supra*, *Electrical Workers Local 426 vs. Baumgartners Elec. Constr. Co.*, 359 U. S. 498, reversing per curiam 77 S. D. 273, 91 N. W. 2d 663, and *Overnight Transportation Co. vs. Teamsters*, 257 N. C. 18, 125 S. E. 2d 277, cert. den. 371 U. S. 862, relied upon by the Teamsters Union in its petition for certiorari, which did not involve significant intimidation or threats to the public order.[5]

4. The Garmon, Evening News and Borden Cases.

In its decision in this case[6] the Court of Appeals observed that a non-federal cause of action is not extinguished because a state court is preempted by federal law from providing relief. The Court of Appeals then specifically stated that it was not deciding that a state court is preempted from entertaining such a suit and awarding damages. As that Court further observed, this Court, on December 10, 1962, decided *Smith vs. Evening News*, 371 U. S. 195, holding that a Section 301, L.M.R.A. action was not subject to the preemption doctrine of the *Garmon* case. The Court of Appeals in the instant case suggested that perhaps the same considerations apply to a Section 303

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[5] The *Garmon*, *Baumgartners* and *Overnight* cases are also distinguishable from this case because those were actions in state courts whereas this one was an action in a federal district court.

[6] Appendix B to the Teamsters Union's petition for certiorari, pages 32-3.

case. On June 3, 1963, this Court decided *Local 100 of the United Association of Journeymen and Apprentices vs. Borden*, ____ U. S. ____, 10 L. Ed. (2) 638, footnote 3 of which is as follows:

> "49 Stat. 452, as amended, 28 U. S. C., Sections 157, 158. We do not deal here with suits brought in state courts under Sections 301 or 303 of the Labor Management Relations Act, 61 Stat. 156, 158, 29 U. S. C., Sections 185, 187, which are governed by federal law and to which different principles are applicable. See, e.g., *Smith vs. Evening News Ass.*, 371 U. S. 195."

The Court of Appeals in the instant case observed that it is implicit from the *Evening News* and *Borden* decisions that the *Garmon* preemption doctrine is inapplicable to both Section 301 and Section 303 actions in state courts. The Respondent submits that it is also necessarily implicit from the *Evening News* and *Borden* cases that the *Garmon* preemption doctrine is inapplicable to a Section 303 action in a *federal* court since state and federal courts have concurrent jurisdiction of such actions. Neither the *Garmon* nor the *Baumgartners* cases, *supra*, of course, were actions under either Section 301 or 303, L. M. R. A.

Summarizing the foregoing, and in conclusion with respect to Question I, it is submitted that:

1. The federal district court in this action had jurisdiction over the Teamsters Union as a consequence of its violation of Section 303, L. M. R. A., and therefore such court had ancillary jurisdiction to apply the state common law to award compensatory and punitive damages for violations thereof.

2. The doctrine of ancillary jurisdiction is one of general application and is not dependent upon the presence of intimidation and threats to the public order.

3. There were, however, intimidation and threats to the public order in this case and such Teamsters Union's conduct was further justification for awarding compensatory and punitive damages under state law.

QUESTION II.

Respondent's total damages were properly awarded him because such damages were occasioned as a result (1) solely of the Teamsters Union's unlawful strike activity, or, construing the facts most favorably for the Teamsters Union, (2) jointly of an inseparable combination of the Teamsters Union's unlawful strike activity and the Teamsters Union's primary picket line.

The Teamsters Union's statement of its second question on page 2 of its petition is, at best, erroneous. The question here is *not* whether Section 303 of the Labor Management Relations Act "authorizes an award of total actual damages for injury resulting directly from a lawful primary strike *merely* because the Teamsters Union also engaged in other conduct which was found to be in violation of Section 303." As the Teamsters Union very well knows, the district court did *not* find that the Wilson element of damages ($9,300.00, page 5, *supra*) resulted directly from a lawful primary strike. Quite importantly, the district court found that the Wilson element of damages was suffered by the Respondent "as a result of the *combination* of lawful and unlawful strike activity" (i.e. secondary boycott activity) of the Teamsters Union as the result of which Respondent "had an insufficient number of truck drivers during the strike to perform fully his contract with Wilson," thus damaging Respondent in the amount of $9,300.00 (F. F. 11 and 12). Because the Team-

sters Union's primary picket line was *not* effective to hurt the Respondent to the desired degree, the Teamsters Union engaged in unlawful secondary activity (C.L. 5) and *thereafter* the *combination* of the primary strike activity and the secondary activity, Respondent had an insufficient number of truck drivers to perform the Wilson job. The courts below were not misled by the Teamsters Union's argument, again advanced here (pages 7 and 11 12 of its petition) to the effect that the Wilson element of damages should not have been awarded because no secondary pressure was applied on Wilson, the Respondent's customer. *Liability* was imposed upon the Teamsters Union because it was proven that the Teamsters Union engaged in unlawful activity; the Wilson element of *damages* was awarded because it was found (F. F. 11 and 12; 475a) that this element of damages was occasioned by the Teamsters Union's unlawful activity combined with the primary picket line.

The only cases here advanced by the Teamsters Union to support its argument against the "totality of effort" rule are *Chauffeurs Local 175 vs. NLRB*, 294 F. (2) 261 (C.A.D.C.) and *Milwaukee Plywood Co. vs. NLRB*, 285 F. (2) 325 (C. A. 7). The Teamsters Union argues that these cases are authority for the proposition that unlawful secondary activity does not warrant the NLRB's enjoining peaceful primary picketing. There is no question about this. Respondent, of course, could not have had the primary picket line removed as a consequence of the Teamsters Union's unlawful secondary activity and did not attempt to, although he did seek and obtain an injunction against the Teamsters Union's unlawful secondary activity. The question is *not* whether a primary picket line can be enjoined. The question is as to the *measure of damages* to be awarded as a consequence of unlawful *secondary* activity. The measure of damages applied by the lower courts

was consistent, as the Teamsters Union concedes on pages 11-12 of its petition, with *Carpenters Local 131 vs. Cisco Construction Co.*, 266 F. (2) 365 (C. A. 9) wherein certiorari was denied by this Court, 361 U. S. 828. In *Cisco* the Court of Appeals observed (266 F. (2) at 367) that the secondary activity, if it were uncommingled with the primary activity, did no substantial damage. The Court of Appeals then went on to hold that the "totality of the (Teamsters Union's) effort" should be considered and that where the totality of the primary and unlawful secondary activities damage the employer, the damages flowing from all such activity are to be awarded. The Court of Appeals in the *Cisco* case held that its decision on this point was consistent with the following four decisions of this Court:

N.L.R.B. vs. International Rice Milling Co., Inc., 341 U. S. 665, 71 S. Ct. 961;

N.L.R.B. vs. Denver Building and Construction Trades Council, 341 U. S. 675, 71 S. Ct. 943;

International Brotherhood of Electrical Workers vs. N.L.R.B., 341 U. S. 694, 71 S. Ct. 954; and

Local 74, United Brotherhood of Carpenters vs. N.L.R.B., 341 U. S. 707, 71 S. Ct. 966.

In its petition for certiorari the union in the *Cisco* case devoted over 20 pages of its brief to its argument against the totality of the effort rule and discussed at length the four decisions of this Court above referred to. Certiorari was denied.

The application of the totality of effort rule in this case is consistent not only with the *Cisco* case but also with *Overnight Transportation Co. vs. Teamsters*, 257 N. C. 18, 125 S. E. 2d 277, cert. den. 371 U. S. 862. In its

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[7] Case No. 206, October 1959 term, petition for certiorari, pages 39-60.

petition[8] for certiorari in that action the union pointed out that in the lower courts the employer had relied upon the *Cisco* case "to support the totaling of damages" and that such courts had totalled and awarded damages for legal and illegal picketing. Certiorari was denied.

We submit that the totality of the effort damage rule is entirely sound and consistent with Section 303 of the Labor Management Relations Act and the fundamental concepts of the law of damages generally. When an employer has been damaged by a combination of a union's lawful and unlawful activity, all doubts should be resolved against the wrongdoer and the employer should be permitted to recover all of his damages. The courts below so held.

The Issues in this Case are not of Importance to the Administration of the Labor Management Relations Act.

In less than two pages of its petition (pages 12-14), the Teamsters Union purports to "appraise every case arising under Section 303 in which punitive damages have been awarded." If the $3,000,000.00 in damages the Teamsters Union finds to have been awarded by state and federal courts since Section 303 came into effect in 1947 is impressive, more impressive is the fact that as of August 24, 1960, when the petition[9] for certiorari was filed in the *Osborne* case, *supra*, 25 cases were then pending against the United Mine Workers Union alone in just the federal courts of Tennessee, Kentucky and Virginia seeking $24,000,000.00 in compensatory and punitive damages, in actions based upon that union's unlawful strike activities.

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[8] Case No. 292, October 1962 term, petition for certiorari, pages 13-15.

[9] Case No. 359, October 1960 term, petition for certiorari, pages 22-23.

By comparison the $34,000.00 in damages awarded in this action is insignificant. At the same time the Teamsters Union argues that punitive damages have never been awarded in the absence of "proven violence." As indicated above (page 11), this Court affirmed judgments against unions for compensatory and punitive damages in *Laburnum* and *Russell* where there were threats to the public order, as there were in this case, but where there was no actual physical violence. As the Court of Appeals said in this case[10] if there had been actual violence here *greater* punitive damages may have been appropriate.

Summarizing the foregoing, and in conclusion with respect to Question II, it is submitted that:

The federal district court correctly awarded Respondent his total damages because such damages were occasioned as a result (1) solely of the Teamsters Union's unlawful strike activity, or, construing the facts most favorably for the Teamsters Union, (2) jointly of an inseparable combination of the Teamsters Union's unlawful strike activity and the Teamsters Union's primary picket line.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

M. J. STAUFFER,
165 East Washington Row,
Sandusky, Ohio,
Counsel for Respondent.

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[10] Appendix B to Teamsters Union's petition for certiorari, page 36.

APPENDIX.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION.

No. 8222 Civil.

LESTER MORTON, d/b/a LESTER MORTON TRUCKING COMPANY,

Plaintiff,

vs.

LOCAL 20, TEAMSTERS, CHAUFFEURS, AND HELPERS UNION, an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Toledo 6, Ohio,

Defendant.

FINDINGS OF FACT.

1. At the inception of the strike hereafter described, the Plaintiff had for many years been engaged in the trucking business in Tiffin, Ohio and he engaged, among other things, in general dump truck operations in which he used his own employees to operate a fleet of approximately 50 dump trucks which were used primarily in work on highway construction. For some years prior to the year 1956 Plaintiff's drivers were members of Local 625 of the Teamsters Union, and when that Union was merged into the Defendant, those employees became members of the Defendant, and were such members throughout the period of the strike in question. There was no contract between

the Defendant and the Plaintiff prior to the strike in question.

2. In August of 1956, Plaintiff's drivers had met with representatives of the Defendant and had voted to strike in the event that the parties could not agree upon the terms of a contract. Plaintiff met with representatives of the Defendant on August 16, 1956, at the offices of the Defendant in Fremont, Ohio. No contract was concluded at that meeting and in the early morning of August 17, a large number of Plaintiff's drivers and representatives of the Defendant appeared at Plaintiff's garage and office premises in Tiffin and initiated the strike against the Plaintiff, which continued until October 5, 1956, when a contract was signed by the parties. That contract, Defendant's Exhibit D, was dated October 5, 1956, to expire March 1, 1959. At the time of the trial of this case in late April and early May of 1961, there was no contract between the parties.

3. Plaintiff's premises were struck by the Defendant on the 17th day of August, 1956, and, on August 21, 1956, pursuant to motion filed by Plaintiff in connection with the petition filed in the Common Pleas Court of Seneca County, Ohio, by the Plaintiff herein against the Defendant herein and certain business agents and members of the Defendant, that court issued a restraining order "restraining the individual defendants and each and all of them, and all persons associated with or acting in concert with said defendants and all others to whom knowledge of this order shall come:

"1. * * *

"2. From interfering with, or by violence, force, intimidation or threats, preventing or attempting to prevent plaintiff, his agents, employees, representa-

tives, customers and others having business with the plaintiff, from entering or leaving plaintiff's place of business and from in any way interfering with, obstructing, delaying or stopping plaintiff's lawful operation of his business or maintenance of his equipment.

"3. From, whether by secondary boycotts or otherwise, interfering with, or by violence, force, intimidation or threats, preventing or attempting to prevent any of plaintiff's customers or any other members of the public from having business relations with the plaintiff.

"4. From following plaintiff's agents, employees and representatives on the public highways or elsewhere.

"5. * * *

"6. From picketing, other than peaceably and by more than two pickets at each entrance, the plaintiff's place of business or any part thereof.

"7. * * *

"8. * * *." (Plaintiff's Exhibit 2.)

4. From and after the issuance of the aforesaid restraining order, Defendant observed the requirements of paragraph 6 above, in that it thereafter confined its number of pickets at each entrance to the Plaintiff's place of business to two. At no time during the strike period, to-wit, August 17, 1956 to October 5, 1956, both inclusive, was violent conduct engaged in.

5. The Plaintiff's contract to haul all of Seneca County's requirements of stone for surface treatment of the County's hardtop roads was terminated August 17, 1956 by Seneca County Engineer William Heim as a result of his learning from his road superintendent of Defendant's strike against the Plaintiff. This termination occurred

several days prior to the date Defendant's business agent Lawrence Evans called upon said county engineer and advised him of Defendant's strike against the Plaintiff. The unlawful activities of the Defendant, hereafter described, had nothing to do with the decision of the said county engineer to terminate said contract. The damages Plaintiff suffered as a result of the termination of said contract, $2,675.33, were too remote to be considered in the computation of damages herein.

6. (a) One of Plaintiff's sources of materials at the time of Defendant's strike against him was the sand and gravel pit of the France Stone Company at Bloomville, Ohio, approximately 8 to 10 miles from Plaintiff's garage terminal.

(b) During the course of the said strike and in violation of the restraining order referred to in paragraph 3, *supra*, the Defendant encouraged the employees of the France Stone Company at its Bloomville sand and gravel pit to engage in a concerted refusal to load Plaintiff's trucks or perform other services for the Plaintiff for the purpose of requiring the France Stone Company to cease doing business with the Plaintiff and for the purpose of forcing or requiring the Plaintiff to recognize or bargain with the Defendant which was not certified as the representative of the Plaintiff's employees.

7. (a) One of Plaintiff's customers at the time of the Defendant's strike against him was the Louis O'Connel Coal Co. of Tiffin, Ohio, which customer engaged in the business of making ready-mix concrete. At the time of the strike, Plaintiff had a contract with the O'Connel company requiring and permitting the Plaintiff to haul all of such customer's requirements of sand and gravel for such ready-mix concrete manufacturing operation.

(b) During the course of Defendant's strike against the Plaintiff, the Defendant encouraged the employees of the O'Connel company to engage in a concerted refusal to use Plaintiff's trucks for the purpose of forcing or requiring the O'Connel company to cease doing business with the Plaintiff and for the purpose of forcing or requiring the Plaintiff to recognize or bargain with the Defendant which was not certified as the representative of Plaintiff's employees.

(c) During the same strike, the Defendant also contacted the management of the O'Connel company directly and advised it of the strike against the Plaintiff and asked the cooperation of the O'Connel company management in connection with such strike.

(d) As a result of Defendant's aforesaid activity, the O'Connel management ceased doing business with the Plaintiff for the duration of the strike.

8. (a) At the time of Defendant's strike against the Plaintiff, Launder & Son, Inc. of Toledo, Ohio, a general highway contractor, was engaged in constructing the bypass of U. S. Route 20 around Fremont, Ohio and Plaintiff, under a subcontract with Launder & Son, Inc. was doing all of the batching on such project, i.e., transporting by truck all of the dry ingredients such as sand, gravel and cement from a stockpile to a self-propelled cement mixer that mixed and laid the concrete for the highway.

(b) During the course of the strike and in violation of the restraining order referred to in paragraph 3, *supra*, Defendant contacted the management of Launder & Son, Inc. and asked that the Plaintiff's trucks not be permitted to work on such job during the strike.

(c) As a result of the Defendant's request, Launder & Son, Inc. ceased doing business with the Plaintiff and

Plaintiff did not work on such construction job after August 22, 1956, until the strike had been terminated.

9. (a) At the time of Defendant's strike against the Plaintiff, C. A. Schoen, Inc. of Toledo, Ohio manufactured asphalt paving material and was purchasing all of its requirements of sand by using Plaintiff as the hauler of that sand.

(b) During the course of the strike, Defendant encouraged the employees of C. A. Schoen, Inc. to engage in a concerted refusal to unload Plaintiff's trucks or perform other services for the Plaintiff for the purpose of requiring C. A. Schoen, Inc. to cease doing business with the Plaintiff and for the purpose of requiring the Plaintiff to recognize or bargain with the Defendant which was not certified as the representative of Plaintiff's employees.

(c) During the same strike and both before and after the issuance of and in violation of the restraining order referred to in paragraph 3, *supra*, the Defendant also contacted the management of C. A. Schoen, Inc. directly and asked such management to cease doing business with the Plaintiff.

(d) The Defendant was successful in its efforts to cause C. A. Schoen, Inc. to cease doing business with the Plaintiff until the issuance of said restraining order and continued its efforts, unsuccessfully, thereafter.

10. During the course of the strike, Defendant caused some of Plaintiff's employees who did go to work and drive Plaintiff's trucks, to be followed in automobiles by Defendant's agents and striking members. This activity had the result of discouraging return to work by an employee who did not want to drive one of Plaintiff's trucks and get followed or get hurt. Accordingly, this activity made the strike of the Defendant against the Plaintiff more

effective to prevent Plaintiff's employees from returning to work than it would have been but for such activity.

11.(a) At the time of the strike, Wilson Sand & Gravel Co. of Upper Sandusky, Ohio was supplying sand to the V. N. Holderman Co. for its job of constructing a by-pass of U. S. Route 25 around Findlay, Ohio and Plaintiff had an agreement with the Wilson Sand & Gravel Co. entitling Plaintiff to haul all of such sand from the Wilson pit near Upper Sandusky, Ohio to the construction site near Findlay, Ohio.

(b) As a result of the combination of lawful and unlawful strike activity of the Defendant, Plaintiff had an insufficient number of truck drivers during the strike to perform fully his contract with Wilson Sand & Gravel Co. and the sand that Plaintiff was accordingly unable to haul was hauled by other truckers who were obtained by the Wilson Sand & Gravel Co.

12. The special damages suffered by Plaintiff for which he should be awarded a judgment for compensatory damages herein total $19,619.62.

13. The acts of the Defendant described at paragraphs 6(b), 7(b), 7(c), 8(b), 9(b), 9(e) and 10, *supra*, had the objective of bringing the Plaintiff to his knees and were done intentionally, maliciously and with wanton disregard of the legal rights of the Plaintiff and others.

14. The Plaintiff should be awarded a judgment for punitive damages herein in the amount of $15,000.00.

CONCLUSIONS OF LAW.

1. On the basis of the pleadings and the entire evidence, the Plaintiff's claim that Defendant engaged in secondary activity unlawful under 29 U. S. C. A., Section 187 raises or presents a substantial federal question and consequently the Court has jurisdiction to adjudicate such claim.

2. The material and operative facts supporting the Plaintiff's federal claim of unlawful secondary activity are substantially the same as the facts supporting his non-federal or state common law claim of unlawful secondary activity.

3. The claim of unlawful secondary activity violative of 29 U. S. C. A., Section 187, and unlawful secondary activity violative of the common law of Ohio are not separate causes of action but are merely different grounds to support a single cause of action, the cause of action being the violation by the Defendant of Plaintiff's right to be free of unlawful interference with his business.

4. By reason of Conclusions 1, 2 and 3 above, the Court has jurisdiction of the non-federal claim of unlawful secondary activity violative of the common law of Ohio, under the doctrine of *Hurn v. Oursler*, 289 U. S. 238, 53 S. Ct. 86, and *UMW vs. Meadow Creek Coal Co.*, 263 F. (2) 52, cert. den. 359 U. S. 1013, and may award compensatory and punitive damages under such common law as well as under the aforesaid federal law.

5. The activities of the Defendant described in Findings of Facts paragraphs Nos. 6(b), 7(b) and 9(b), violated 29 U. S. C. A., Section 187 and the activities of the Defendant described in Findings of Facts paragraphs Nos. 6(b), 7(b), 7(c), 8(b), 9(b), and 9(c) violated the Ohio common law regarding unlawful secondary activity and

compensatory and punitive damages may be awarded to the Plaintiff accordingly.

6. As the result of the Defendant engaging in both lawful and unlawful strike activity against the Plaintiff between August 17 and October 5, 1956, the totality of Defendant's efforts may be considered and damages may be awarded the Plaintiff based upon all loss suffered as a result of Defendant's unlawful strike activity against the Plaintiff and as a result of Plaintiff's having fewer truck driving employees working during the strike than he would have had but for the combination of Defendant's lawful and unlawful strike activity against the Plaintiff.

/s/ FRANK J. KLOEB,

United States District Judge.

Toledo, Ohio.